Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C. 20554

In the Matter of	)
	)
Proceedings for the Distribution of Cable Television Royalty Fees	)

REPLY BRIEF CONCERNING THE ISSUE OF THE BROADCAST DAY AS A COPYRIGHT COMPILATION

Superstation, Inc., licensee of television station WTBS(TV), Atlanta, Georgia, by its attorneys, hereby submits its Reply Brief Concerning the Issue of the Broadcast Day as a Copyright Compilation in response to the briefs submitted by various claimants before the Copyright Royalty Tribunal.*/

Those claimants who oppose the compilation claim have generally advanced these arguments: that the claim is unfounded, not supported by the history of the Act, and therefore is invalid; that there is no value in the compilation even if one were to be allowed; and that since the compilation in the broadcast day must be fixed, acceptance of such a claim would violate the licensor's right of reproduction. It is submitted that these arguments must be disallowed for the following reasons.

*/ Briefs filed in opposition to the compilation theory include those filed by the Motion Picture Association of America, the American Society of Composers, Authors, and Publishers, the Joint Sports Claimants, and the National Collegiate Athletic Association.

Congress Did Not Preclude A Claim In A Compilation

Various claimants place great emphasis on the argument that the broadcast day as a compilation was never considered by Congress nor proposed by the NAB during the Congressional hearings on the Copyright Act. However, this is of no import in the present proceedings. While Congress in drafting the Copyright Act of 1976 sought to deal with new advances in communications, it did not write on a blank page. The Act of 1976 was based on a body of existing copyright law that recognized the integrity of a copyright in a compilation. In response to Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), and Teleprompter v. CBS, Inc., 415 U.S. 394 (1974), Congress determined that cable television systems should be liable in copyright for carriage of secondary transmissions. However Congress did not preclude stations from claiming a copyright in the compilation of programs which are transmitted as secondary transmissions. While §111(d)(4)(A) indicates that Congress desired the owners of nonnetwork programming to be recompensed under the Act, there is nothing in §111 or its history which suggests that Congress intended to abrogate any of the preexisting rights in a compilation either under the 1909 Act or §101 of the present Act.

Congress did not place a limitation on the claimants who could recover royalties other than to make it clear that royalties were only to be paid by cable television systems for nonnetwork programming. Nor did Congress preclude the Tribunal

from finding that the compilation of programs broadcast by a station and transmitted by a cable system constituted a valid claim. The legislative history of the Act states:

> The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty Commission in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty Commission should consider all pertinent data and considerations presented by the claimants. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 97 (1976).

The allowance of a claim in the compilation of a broadcast day by the Tribunal would satisfy the purpose for which Section 111 was created: to recompense broadcasters and other copyright owners for the use of their works by cable systems.

Thus broadcasters who are the copyright holders of programs may make a claim whether it is for their own program or their compilation of programs. The fact that references to "programs" can be found in various portions of §111 does not support the MPAA's contention that a claim may only be filed by the owner of a separate program nor its conclusion that television stations are precluded from filing claims based on the compilation of nonnetwork programming which, in the case of independent stations such as WTBS, comprises the entire broadcast day. Under §111 cable systems directly benefit from the carriage of the compilation of programs comprising the broadcast day just as

they benefit from the carriage of individual programs. It is precisely because stations exercise the creative skills in compiling the programming which comprises the broadcast day that individual claimants are able to state a claim. It is the broadcaster through its schedule that creates the vehicle with which other copyright owners are able to obtain compensation from cable systems. Broadcasters have no less a stake in these royalties based on their compilations of separate programs than do the claimants who license their individual programs for broadcast in a station's market. The copyright owner of a program who grants a station the right to broadcast its work has also granted the station the right to utilize that program in the compilation of the station's broadcast day. A broadcast station's claim based on a compilation is no less valid than a claim for an individual program since both claims arise from the use of the claimants' property by the cable system.

Those claimants who attempt to minimize the element of creativity that is inherent in the creation of the broadcast day seek to disregard the obvious. Generally cable television systems choose to transmit stations rather than programs. Stations are chosen for carriage based on the station's individual identity which is the result of a station's selection of programming rather than any individual program which is transmitted. It is this individual identity expressed throughout the broadcast day that is a result of the compilation and which warrants a portion of the royalties collected from cable television systems.

A finding by this Tribunal that a claim in a compilation is valid would be based on logic and the recognized property right of an author in a compilation under §101. However, it would also be a recognition of the creative effort and value of the compilation which can be best demonstrated by the widespread carriage of WTBS on cable systems around the country. The most recent FCC reports indicate that as of November 1979, WTBS was being carried on 1,057 systems, WGN-TV on 320 systems, and WOR-TV on 70 systems. While it is recognized that WTBS has been available by satellite longer than any other signal, the current carriage of WTBS by cable systems indicates that the effort and creativity utilized in creating its compilation of programs has a separate value apart from any of the individual programs that are transmitted. Each of these stations generally carries the same mix of movies, sports and syndicated programming, yet carriage of WTBS clearly outdistances these other two independents since these three major independent stations are now equally available to cable operators via satellite. The actions of cable operators in choosing WTBS clearly and demonstrably indicates that there is indeed a separate and quantitative element in a compilation of a broadcast day.

As noted above, Congress did not wish to tie the hands of this Tribunal in determining the distribution of royalties to copyright claimants. Congress believed that the Tribunal should consider all pertinent data and considerations offered by the

claimants. It is submitted that an award of royalties based on the compilation of the broadcast day would be responsive to the intent of §111 of the Act and the wishes of Congress.

A Claim In a Compilation Does Not Require A Fixation of the Entire Broadcast Day; It is Sufficient that Each Segment Be Fixed

Stations can meet the requirement under §102 of the Act that a work be fixed in a tangible medium of expression in two ways. Either a station can simultaneously broadcast and record a live performance, or it may prerecord such material before broadcast. Programs in which others own the underlying copyright are already fixed. It is asserted by various claimants that the act of recording the programming for which stations obtained a license to broadcast in their own market is a per se violation of their licenses and thus renders their claim based on the compilation of the broadcast day invalid. Since the programming which a station broadcasts under a license is already fixed, it is not necessary that it be copied again in order to support a claim for a compilation.

However, even if the Tribunal determined that a compilation of the broadcast day in order to be valid had to be re-recorded in its entirety, it is submitted that the broadcaster would have the right to do so in order to perfect its claim. While claimants contend that the Act itself prohibits the copying of an audiovisual work, it should be remembered that Congress recognized that there were some situations in which the use of a

copyrighted work would not be an infringement. §112 itself was a recognition that there were certain instances in which the public interest outweighed the right of an author. Similarly §110 of the Act exempts certain performances and displays of a work from copyright liability. Moreover, Congress found it incumbent to enact §107 which codified the judicial doctrine of fair use. Therefore should the Tribunal find that a copyright may subsist in the compilation of the broadcast day, it is submitted that this right cannot be denied by preventing a claimant from making a copy of the compilation in order to perfect its claim. To determine that such a claim can exist yet prevent a claimant from perfecting it would be illogical and against public policy.

Wherefore, in view of the foregoing, it is submitted that a claim of cable royalties in the broadcast day as a copyright compilation should be allowed.

Respectfully submitted,

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November 28, 1979

CERTIFICATE OF SERVICE

I, Clair Fielder, a secretary in the law office of Smith & Pepper, do hereby certify that I have caused to be mailed, postage prepaid, this 28th day of November, 1979, copies of the foregoing "Reply Brief Concerning the Issue of the Broadcast Day as a Copyright Compilation" to the following:

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WTBS is transmitted via satellite to over five million cable television subscribers around the country. Its programming schedule is a varied one consisting of sporting events, films, syndicated series, and news and public affairs programming. The schedules of programs broadcast each day by WTBS and other broadcast stations and transmitted by cable systems as secondary transmissions qualify as compilations under the Copyright Act. A broadcast station, as any other author, is therefore entitled to be recompensed under the Act for the creation of these compilations.

It is a well established tenent of copyright law that copyright ownership may subsist in a compilation. Section 7 of

the Copyright Act of 1909, 17 U.S.C. §7, afforded copyright protection to a compilation just as does the current Act. Section 101 of the Copyright Act of 1976, 17 U.S.C. §101, defines a compilation as:

> ... a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collected works. 17 U.S.C. 101.

A broadcast station retains rights of ownership in the compilation of programs that comprises its broadcast day just as it retains rights in the programs that it owns. A compelling case for recognition of a copyright in the broadcast day can be made both under case law and under the Copyright Act of 1976. §102 of of the Act, 17 U.S.C. §102, provides that copyright protection subsists in original works of authorship which include motion pictures and audio visual works. Section 103 further provides:

> (a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.
>
> (b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.

The legislative history of the 1976 Act makes it clear that Sections 102 and 103 complement each other.

> Section 103 complements Section 102: A compilation or derivative work is copyrightable if it represents an original work of authorship and falls within one or more of the categories listed in Section 102. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in Section 102 apply with full force to works that are entirely original and to those containing pre-existing material. Section 103(b) is also intended to define, more sharply and clearly than does Section 7 of the present law, the important interrelationship and correlation between protection of pre-existing and of "new" material in a particular work. H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 57 (1976).

Thus the selection, scheduling, and presentation of programs resulting in a compilation secures a valid copyright which falls squarely within the intent and the letter of the Act. This compilation has an existence separate and apart from any of the pre-existing programs that are broadcast. Moreover, each compilation can itself be construed as a transmission program which is defined by §101 of the Act as "a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit." 17 U.S.C. §101.

WTBS, as an independent broadcast station, exercises complete control over the selection and arrangement of the programs that it broadcasts. This creative effort undertaken in constituting its schedule is the same as the creative effort recognized under the Copyright Act in the preparation of an

anthology or a catalogue. It is the arrangement, the plan, and the manner in which a work is put together by an author which constitutes originality. Gelles-Widmer Company v. Milton Bradley Company, 313 F 2d 143 (1963).

WTBS must routinely select from hundreds of offerings those syndicated programs and films which ultimately comprise its daily broadcast schedule. It also must create and integrate its own promotional material, public affairs, entertainment programs, and commercial matter into its schedule. Each aspect of this process involves a degree of artistic judgment and creativity which is as great as that found in any other compilation.

Moreover, the selection and placement of these programs in a schedule imbues a station with a unique identity. This identity results from the compilation of programs rather than the selection, promotion, or broadcast of any one program and this is demonstrated by the fact that cable television operators normally do not choose to transmit individual programs--instead they select particular television and radio stations for transmission to their subscribers. Each month hundreds of cable systems choose to carry WTBS as a result of the effort that has been expended in creating the compilation of programs that viewers watch. The phenomenal success of WTBS is testimony to the validity of a claim for a portion of cable television royalties based on the broadcast day as a copyright compilation.

Courts have time and time again recognized the validity of copyright in a compilation based on the creative properties displayed in such a work. The test for determining copyrightability is originality (i.e., independent creation or individuality of expression) rather than novelty, and that originality of even the slightest degree, even if it amounts to no more than a rearrangement of age-old ideas, is sufficient is without dispute. Pantone, Inc. v. A.I. Friedman, Inc., 294 F Supp. 545, 548 (1968). A station's selection and arrangement of programs evidences a sufficient degree of originality necessary to constitute a valid compilation. Thus the compilation is protected from others who would try to utilize the programs in the same manner as the station.

> It must be borne in mind that (a) compilation is the sum total of the words and phrases as arranged by the author and that (a) copyright is valid because of the originality of the combination. Where the statute allows a compilation to be copyrighted, it seems clear that no one can copy phrases or sequences which are original with the author or appropriate any part of the copyrighted work, whether that part of one work is in the public domain or not. Hartfield v. Peterson et al., 91 Fed. 2d 998, 1000 (2d Cir. 1937).

It is the collecting, appraisal, description and editing which are protected under a compilation. Adventures in Good Eating v. Best Places to Eat. 131 Fed. 2d 809, 812-813.

It is not only logical but proper under the Act for a station to receive credit for the creative effort involved in the selection of countless programs and their arrangement and presentation in a daily schedule. Broadcast stations are therefore entitled to a portion of the royalties remitted by cable television systems based on the compilation of a broadcast day in addition to any of the other rights that the stations or other claimants may hold with respect to the individual programs that are transmitted over cable television systems.

Respectfully submitted,

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